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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966.

**No. 1093**

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, AN UNINCORPORATED ASSOCIATION; JOHN T. KENNEDY, JAMES P. PALM, AND PAUL L. WARD, INDIVIDUALLY, AND FOR ALL OTHERS SIMILARLY SITUATED,
*Appellants,*

*vs.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION, AND THE PULLMAN COMPANY, A CORPORATION,
*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

## BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

HARRY WILMARTH,
1120 Merchants National Bank Building,
Cedar Rapids, Iowa 52406,
BURKE WILLIAMSON,
29 South LaSalle Street,
Chicago, Illinois 60603,
*Counsel for Appellants.*

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## BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

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### Importance of Questions.

This appeal raises the question whether common carriers may enter into a contract to modify a pooling agreement in order to effectuate a "partial withdrawal" from the pooling without obtaining Commission approval in spite of the provisions of Section 5(1) of the Interstate Commerce Act which require Commission approval of contracts for "any portion" of a pooling.

Thus this appeal raises the fundamental question of employee protection under Section 5(1) of the Act for employees displaced from employment by a "partial withdrawal" from a pooling.* Under the similar provisions of other sections of the Act relative to leases and abandonments this Court has held that the Commission had power to enter an order affording some benefits to displaced employees. This Court has not heretofore decided whether the Commission is authorized by Section 5(1) of the Act to issue a protective order for employees.

**Authority of Commission With Respect to Withdrawals From Pooling Agreements Under Section 5(1) of Interstate Commerce Act.**

The Commission contends that it has no statutory authority to approve or disapprove a "withdrawal" from a previously approved pooling agreement. Arguing from this premise it is urged that the Commission therefore has no authority to approve or disapprove a "partial withdrawal" or a "withdrawal *pro tanto*" or to enter a protective order for employees losing employment (Govt. Motion, pp. 8-9; Pa. Motion, pp. 6-8).

The Commission argues that Section 5(1) of the Interstate Commerce Act only prohibits common carriers from "entering" into pooling agreements without Commission approval, and that it does not impose any prohibition on discontinuance of the pooling (Govt. Motion, p. 8, Pa. Motion, p. 7). This construction of Section 5(1) was expressed by the Commission in a proceeding involving the New York Central Railroad entitled, *Pooling of Railroad*

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* The motions to affirm filed on behalf of the Interstate Commerce Commission and The Pennsylvania Railroad will be answered in a single reply. For convenience both movants will sometimes be referred to as "the Commission".

*Earnings and Service, Pullman Co.*, 306 I. C. C. 138, 140. The Commission said:

> "While changes in pooling arrangements require approval, there is no provision which states that permission must be obtained to discontinue a pooling arrangement, . . ."

In further support of its lack of power the Commission argues that Section 5(1) is grounded in concern with the anti-competitive effects of pooling agreements, that the discontinuance of a pooling arrangement carries none of the dangers of its formation, and that its discontinuance is actually given support by anti-trust policies of encouraging competition (Govt. Motion, p. 9; Pa. Motion, p. 7).

It is submitted that even as to the total discontinuance of the pooling arrangement the Commission's interpretation of Section 5(1) is so formalistic and mechanical as to ignore the public interest that section seeks to foster. If approval of the pooling was warranted in the public interest in spite of its anti-competitive effects and in spite of the Pullman anti-trust decrees, it is inconsistent for the Commission to conclude that anti-trust policy still encourages the dissolution of the pooling irrespective of the consequences. Statutes are not to be read so restrictively.

Besides misconstruing its responsibilities under Section 5(1) of the Act, the Commission has also overlooked the provision in the Final Judgment of the Court in the anti-trust proceeding entered May 8, 1944:

> "31. Nothing in this judgment contained shall be construed as depriving the Interstate Commerce Commission of its jurisdiction over contracts between carriers under Section 5(1) or other provisions of the Interstate Commerce Act."

Regardless of whether the Commission is or is not correct in interpreting Section 5(1) as rendering it powerless to

approve or disapprove the entire dissolution of a pooling, the Commission compounds its generalization into a total abdication of responsibility when it ends it to an alleged lack of power to approve or disapprove a "partial withdrawal" from a pooling.

Section 5(1) specifically charges the Commission with the power and responsibility to approve "any portion" of a "pooling or division of traffic, or of service, or of gross or net earnings". The statute thus provides for Commission approval when modifications in the pooling agreement are made so as to provide for participation in only a portion of the pooling. The withdrawal of one or more railroads from a pooling arrangement may have a considerable competitive effect or may have little or none. It may substantially undermine the foundations of the original statutory findings of the Commission as to "better service", or may affect the original findings only negligibly. Section 5(1) of the Act permits the Commission to investigate, "upon its own initiative". The statute directs that the Commission hold a hearing to find out what effect a portion of a pooling will have on "better service", on "economy in operation", on "competition", whether the "consideration" between the carriers is "just and reasonable", and whether "terms and conditions", including employee protection, should be imposed on continuance of the changed pooling arrangement.

When the New York Central Railroad discontinued the pooling arrangement on its local lines in 1958 the Commission ignored the statutory direction and applied its general interpretation that, since it lacked power to approve or disapprove a discontinuance of the entire pooling arrangement, it lacked power to approve or disapprove either the withdrawal of the New York Central's local lines or to reopen the proceedings for a further hearing and imposi-

tion of employee protection for the employees who lost their employment.

While appellants believed this conclusion erroneous there was also reason to believe that other railroads would not follow the lead of the New York Central. With the exception of the Rock Island, which had little sleeping car service, none has.

But that is not the type of withdrawal contemplated by the Pennsylvania in the within appeal. Pennsylvania proposes extensive amendments and modifications of the pooling agreement to change or eliminate parts thereof, but proposes to continue in the remaining portion of the pooling as modified. Pennsylvania not only would change the pooling of services but also would substantially change the pooling of earnings.

In the *Brogan* case, 211 F. Supp. 881, an officer of The Pullman Company conceded that the arrangement proposed by the modifications of the pooling agreement between Pennsylvania and Pullman was unique and that he knew of no other railroad in the United States "operating under an arrangement such as is contemplated by the September 11, 1962 contract with Pennsylvania".

The Commission has sought to make it appear that the Pennsylvania amendments of the pooling agreement are substantially similar to the New York Central withdrawal from the pool. Unlike New York Central, however, Pennsylvania and Pullman used eleven printed pages in setting forth amendments and modifications of the pooling agreement which is itself forty-nine printed pages. In the New York Central proceeding all railroads, including Pennsylvania, joined in the Central's brief to the Commission in which the distinction between a withdrawal from, as opposed to an amendment of, a pooling agreement was urged as controlling. The railroads then argued that Commission

approval was required "where an existing pooling arrangement is modified". The railroads' argument continued as follows:

> "But this is so only because substantial modification of an existing pooling arrangement amounts to the creation of a new pool. What requires approval is the new pooling arrangement and not withdrawal from or termination of the old one. Furthermore, in this (N. Y. C.) case, the pooling agreement is being continued unchanged in any event, and there is no modification whatever."

Pennsylvania did the very thing that the railroads said New York Central hadn't done, that is, change the pooling agreement. Yet the Commission says that it doesn't see any necessity for "an evidentiary hearing" to determine the impact of Pennsylvania's proposed changes in the approved pooling agreement, or whether the changed arrangement is in accord with the 1947 and 1949 findings of the Commission approving the pooling which Pennsylvania seeks to change (268 I. C. C. 473, 276 I. C. C. 5).

The Commission now euphemistically describes Pennsylvania's proposed new pooling arrangement as a "partial withdrawal" and readily concludes that Section 5(1) of the Act is not applicable.

No matter whether this is a "partial withdrawal", or an amended and therefore new pooling agreement, it is plain that the Congress intended for the Commission to look into such a different situation. Will the new plan be in the interest of better service to the public or of economy in operation? Will the new plan unduly restrain competition? What rules and regulations will the Commission prescribe? What consideration as between the carriers and what terms and conditions will the Commission approve? Will the Commission find the terms and conditions "to be just and reasonable in the premises" if the Pullman conduc-

tors thus forced into unemployment are ignored by the Pennsylvania's plan? In its consideration of "economy in operation", what provisions will the Commission make for the Pullman conductors at whose expense the "economy in operation" is planned to be achieved?

Thus this appeal raises the fundamental question of employee job protection under Section 5(1) of the Interstate Commerce Act.

**Determination of "Reasonable and Non-Discriminatory Terms" Under the Uniform Service Contract.**

The pooling arrangement approved by the Commission in 1949 provided that on request of a pooling member Pullman would furnish "partial service on reasonable and non-discriminatory terms;" and that the pooling "contract shall be subject to such modification as may, in the particular case, be necessary to provide reasonable and non-discriminatory terms therefor."

One would suppose that the determination of what were "reasonable and non-discriminatory terms" would include not only the rights of the other pool members and of Pullman but also the rights of employees affected by the new terms in view of this Court's decisions in *United States* v. *Lowden*, 308 U. S. 225 and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373.

But Pennsylvania has never submitted to anyone the question of whether the terms are "reasonable and non-discriminatory". Instead, it succeeded in obtaining from the Commission the order now under attack which finds that Pennsylvania's new contract is "fully contemplated by the terms of the pooling agreement", does not violate the Commission's prior orders, and does "not require our specific approval."

The Commission, in explanation of its conclusion that the Pennsylvania amendments do not constitute a change in the pooling, says that:

> "Section 2 of the Uniform Service Contract, previously approved by the Commission (in 1949), specifically provided for this contractual method of implementing the railroad's right to obtain a partial service from Pullman" (Govt. Motion, pp. 4-5, 9).

But nowhere in Section 2 is there any provision that modifications of the pooling agreement may be made without the Commission's prior approval. The Commission's order is also silent as to who should decide what are "reasonable and non-discriminatory terms" for the partial service requested. The Honorable Joseph Samuel Perry, who dissented in the Court below, begins his opinion with the following discussion of this point (J. S. xiv):

> "In my opinion, both the Commission and the defendants here lean too heavily upon Section 2 of the Uniform Service Contract which was approved by the Commission. That Section provides that a railroad, which itself desires to furnish part of the service in connection with its sleeping car operations, may request that Pullman furnish a partial form of sleeping car service on lines of the railroad, whereupon Pullman shall furnish such partial service on reasonable and non-discriminatory terms. The concluding clause of the Section, however,—which provides that the contract shall be subject to such modification as may, in a particular case, be necessary to provide reasonable and non-discriminatory terms therefor—has been read by defendants to permit, ad infinitum, future contract modifications, and all without obtaining the prior approval of the Commission, apparently on the ground that Commission approval of the Uniform Service Contract is approval of such future modifications."

We respectfully submit that in approving the pooling agreements in 1947 and 1949, the Commission certainly

did not approve in advance the Pennsylvania's proposed amendments and modifications which were not even devised until 1962.

### Use of Pullman Conductors Contemplated Under the Pooling Plan.

The Commission says that it refused the appellants' request for protection in the 1947 Commission proceedings and that no review of the Commission's denial was sought. But in 1947 the Commission assured the employees that a protective order was unnecessary because they were part of the pooling plan saying (268 I. C. C. 473, 490):

> "The plan clearly contemplates use of the present Pullman employees in the unified service, since one of the advantages claimed for the plan, as previously stated, is the availability of a reserve of trained workers in Pullman service."

Now the Commission has reversed itself and has held that the plan always contemplated that the pooling might be amended so as to eliminate the employees from the pooling plan and throw them out of work without a protective order.

### Right of Employees to Protective Conditions.

The Commission suggests that Pullman employees who lose their livelihood "may not be heard to urge that a railroad's right to perform part of its own sleeping car service should be restricted by the imposition of protective conditions . . ." (Govt. Motion, p. 10). This is an astounding misconception of the nature of protective conditions for employees. Protective conditions are not imposed in derogation of the railroad's rights, but in recognition that by exercising them the railroad will achieve great savings at the expense of its employees who should not be forced to

bear the entire burden of the loss, while the railroad reaps the entire gain. This principle has long been recognized by Congress, by Emergency Boards appointed under the Railway Labor Act (45 U. S. C. Sec. 151, et seq.), and by this Court. One of the earlier statements of the principle appears in the report of an Emergency Board appointed March 30, 1929, to investigate a dispute on the Texas & Pacific Railroad Co. arising from the railroad's exercise of its right to change its terminals thereby resulting in substantial losses to employees in depreciated property values and moving expenses. The carrier estimated that the changes would bring annual savings to it of not less than 15%. The Emergency Board, recognizing the carrier's right to make the change, nevertheless said:

> "The change from Longview Junction to Mineola and from Marshall to Shreveport will result in a substantial saving for the carrier. It is not fair, we think, that the carrier reap the entire benefit and that the employees be compelled to bear the entire loss. • • • We are therefore constrained to the view that in the circumstances here presented the loss should be borne equally by the carrier and the employees."

In other cases the Commission has voluntarily, and in the absence of a mandatory statutory direction, granted protection to employees whose livelihood was destroyed by the exercise of railroad privileges approved by the Commission. In *United States* v. *Lowden*, 308 U. S. 225, this Court sustained the Commission's authority to impose protective conditions under general statutory authority, similar to Section 5(1), to attach such terms and conditions as it may find "to be just and reasonable".

The Commission, however, in *I. C. C.* v. *Railway Labor Assn.*, 315 U. S. 373, denied its authority to impose protection for the employees' loss of livelihood in a railroad abandonment resulting in a net annual savings to the rail-

road of $378,000, of which $302,000 per annum "would be due to a net wage loss suffered by employees." This Court affirmed the judgment of a three-judge court setting aside the Commission's order and again affirmed the Commission's power to impose protective conditions, saying:

> "It was not until 1935, fifteen years after the passage of § 1 (20), that the Commission first decided that it was without power to impose conditions for the protection of workers in an abandonment. Chicago G. W. R. Co. Trackage, 207 I. C. C. 315, 322. At that time, the Commission took the position that requiring displacement allowances as a condition would be the equivalent of granting a private benefit to a particular group of workers, and therefore beyond the scope of authority granted by Congress. The Commission has taken the same position here. It must not be forgotten, however, that the immediate result of permitting the abandonment itself is a private benefit for the railroad in the form of savings realized by discontinuing uneconomic services. The justification lies in the benefit to the transportation system which the Commission concluded the abandonment would produce."

**Basic Contention of Appellants: Section 5(1) of the Interstate Commerce Act Requires That the Pennsylvania-Pullman Revision of the Pooling Be Submitted for Approval of the Commission.**

At page 7 of its Motion the Commission declares:

> "1. Appellants' basic contention (J. S. 18-19) is that a railroad cannot choose to obtain only a partial service from Pullman, but must either accept all services offered by Pullman or withdraw part or all of its lines entirely from the Pullman pool."

A re-reading of pages 18 and 19 of the Jurisdictional Statement by the appellants discloses no such "basic contention." These pages are a part of the subdivision beginning

at page 13 of the Jurisdictional Statement which is entitled as follows:

> "'Section 5(1) of the Interstate Commerce Act Requires That the Pennsylvania-Pullman Revision of the Pooling Be Submitted for Approval of the Commission.'"

This subdivision heading succinctly states the appellants' "basic contention."

**Appellants' Right to an Evidentiary Hearing.**

The Commission at pages 11-12 of its Motion defends its denial of the appellants' request for an evidentiary hearing. The Commission notes that hearings, in which the appellants participated, were held prior to the Commission's approval of the pooling agreement in 1947. The presumption apparently intended is that this was hearing enough for the appellants.

The Commission also comments that it had found that appellants "had demonstrated 'no material changes in circumstances affecting railroad sleeping car service, . . .'." Just how the appellants were to have made the demonstration without being permitted an evidentiary hearing is not indicated.

The Commission observes at page 12 of its Motion that "appellants did not question before the Commission that the provisions of the contract were 'reasonable and nondiscriminatory,'." The appellants appeared before the Commission in opposition to the petition of the Pennsylvania for a declaratory order. The Pennsylvania did not ask for a finding by the Commission that the provisions of the Uniform Service Contract, as amended by the Pennsylvania, were "reasonable and non-discriminatory". Instead, the Pennsylvania asked the Commission to find that the arrangement proposed for the performance of partial

sleeping car service "does not require the specific approval of the Commission under Section 5(1) of the Act. . . ." The appellants resisted the Pennsylvania's petition and asked that a hearing be set for the introduction of evidence. This was denied.

**The Commission Lacked Jurisdiction to Determine That the Collective Bargaining Agreement of Pullman Conductors Would Not Be Abridged by the Proposed Changes.**

The Commission asserts in its motion that its order under review doesn't make any determination in respect to appellants' collective bargaining agreement (Govt. Motion, pp. 10-11). We submit that the order under review speaks for itself. In its order the Commission specifically "finds" that "the current proposal" of Pennsylvania will not result in any "abridgement" of appellants' collective bargaining agreement (J. S. xxiii-xxiv). It is apparent that the Commission was unable to resist its own interpretation of appellants' collective bargaining agreement. It has even persisted in interpreting it, not only in the order under review, but throughout argument of its motion (Govt. Motion, pp. 7, 10, 11). In attempting to interpret appellants' collective agreement the Commission has ventured far outside its jurisdiction. It is respectfully submitted that the Commission ought not to engage in the unfamiliar field of analysis and interpretation of railway collective bargaining agreements and on the basis of its interpretation of such agreements decline to hold the hearing required by Section 5(1) of the Act.

## Conclusion.

We urge that the questions presented in this case are substantial and that they are deserving of this Court's review.

Respectfully submitted,

HARRY WILMARTH,
1120 Merchants National Bank Building,
Cedar Rapids, Iowa 52406,

BURKE WILLIAMSON,
29 South LaSalle Street,
Chicago, Illinois 60603,
*Counsel for Appellants.*

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

## ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1093. Decided June 12, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted and the case set for oral argument.